FILED
ALEXANDER L. STEVAS
CLERK

No. 81-2107

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ALICE LOUISE MILLER, ET AL, *Petitioners*

v.

TIM CURRY, CRIMINAL DISTRICT ATTORNEY, ET AL, *Respondents*

On Petition for a Writ of Certiorari to the Supreme Court of Texas

Respondents' Brief in Opposition

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LIST OF ALL PARTIES

Respondents Tim Curry, Criminal District Attorney of Tarrant County, Texas and Louis Barnett, former Assistant District Attorney of Tarrant County, Texas noting that Petitioners have wholly failed to comply with the requirements of Rule 21.1(b) of this Court submit the following list of the names of all parties in order that the Justices of this Court may evaluate possible disqualification or recusal:

Petitioners:

Alice Louise Miller, a minor
Malinda Wynell Miller, a minor
Rosalie Evelyn Miller, a minor
Charles A. Miller, next of friend of above named minors

Garzell Jashawn Murrell, a minor
Gerlynda Jashell Murrell, a minor
Ganadra Dena Murrell, a minor
Pauline Givens, next friend of above named minors

Respondents:

Honorable Tim Curry, Criminal District Attorney
Tarrant County, Texas

Mr. Louis Barnett, former Assistant District Attorney
Tarrant County, Texas

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Respondents' Brief in Opposition

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Respondents Tim Curry, Criminal District Attorney of Tarrant County, Texas and Louis Barnett, former Assitant District Attorney of Tarrant County Texas respectfully request that this Court deny the Petition for Writ of Certiorari to the Supreme Court of Texas in support of such request would show as follows:

REASONS WHY WRIT SHOULD BE DENIED

Petitioners advance two reasons why they believe the Writ of Certiorari should be granted in the cause *sub judice*. Petitioners have failed to invoke the jurisdiction

of this Court and attempt to bring before the Court nothing except well settled questions of federal law.

I.
CERTIORARI DOES NOT LIE TO THE SUPREME COURT OF TEXAS

Petitioners have requested a writ of certiorari to the Supreme Court of Texas implying that the same is authorized by 28 U.S.C. §1257(3). The highest court of Texas in which "a decision could be had" in the case at bar is the Texas Court of Appeals for the Second Supreme Judicial District. Following the decision of that Court, Petitioners made an application for writ of error to the Supreme Court of Texas which refused the application with the notation "no reversible error." Such review by the Supreme Court of Texas is discretionary. Under established law, certiorari lies not to the Supreme Court of Texas but to the Texas Court of Appeals, if it lies at all. *Adam v. Saenger*, 303 U.S. 59 (1938); *Bacon v. Texas*, 163 U.S. 207 (1896); *Western Union Telepgrah Co. v. Priester*, 276 U.S. 252 (1928). This petition should be dismissed. *cf. Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157 (1954).

II.
THE PETITIONERS HAVE FAILED TO DEMONSTRATE THAT THE FEDERAL QUESTION UPON WHICH THEY SEEK REVIEW WAS TIMELY AND PROPERLY RAISED AT EACH STAGE OF THE PROCEEDINGS BELOW.

Under the express provisions of Rule 21.1(h) the Petitioners are required to set out in their statement of the

case that the federal question upon which review is sought was timely and properly raised at each stage of the state court proceedings.

Petitioners have failed, neglected, or refused to do so, preferring instead to wax sorrowfully about matters wholly outside of the record in this case. Petitioners obviously feel that the jurisdiction of this Court is invoked by way of appeal to sympathy through colorful fiction and prose.

Having failed to demonstrate that the federal question upon which review is sought was timely and properly raised the Petitioners have failed to invoke the jurisdiction of this Court. *cf. Cardinale v. Louisiana*, 394 U.S. 437 (1969)

III.
NO UNSETTLED AND IMPORTANT QUESTION OF FEDERAL LAW IS PRESENTED

Even assuming that the Petitioners' are able to correct the obvious deficiencies in their Petition such as those pointed out hereinabove, they bring to this Court for review well-settled questions of federal law.

It should first be noted that Petitioners sought money damages only from the prosecuting attorney and his former assistant. This Court, in no uncertain terms, recognized the need for and existence of *absolute* quasi-judicial immunity for prosecutors for their activities which were "intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman*, 424 U.S. 409 (1976).

While this Court did not attempt to set out with precision the exact limits of such immunity, it did make clear that the decision of *whether* to prosecute clearly fell within the heart of absolute immunity when it said:

> "We recognize that the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom. A prosecuting attorney is required constantly, in the course of his duty as such, to make decisions on a wide variety of sensitive issues. These include questions of whether to present a case to a grand jury, whether to file an information, whether and when to prosecute, whether to dismiss an indictment against particular defendants, which witnesses to call, and what other evidence to present." *Imbler v. Pachtman*, 424 U.S. at 431.

Petitioners here seek nothing less than the abolition of prosecutorial immunity.

The second reason advanced by the Petitioners for granting the writ — that decedents were denied equal protection of the law and deprived of their lives without due process of law — is likewise absurd.

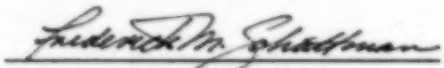
First, it should be noted that the question of denial of due process of law was not raised in the trial court and is therefore not properly before this Court. With regard to the equal protection claim it should be abundantly clear that the Petitioners' claim is that they are entitled to force a prosecution. In *Linda R. S. v. Richard D.*., 410 U.S. 614 (1973) this Court held that injured parties cannot compel a prosecution. Petitioners argument, reduced to its essence, is that they should be allowed to compel indirectly a prosecution by subjecting a prosecutor to

money damages if he will not file the case that the alleged injured party desires.

CONCLUSION

The Petition for writ of certiorari to the Supreme Court of Texas should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that three (3) copies of this Brief in Opposition have been served upon Petitioners' counsel in accordance with the Rules of this Court.

Dated this 10th day of June, 1982.

Frederick M. Schattman